88- 1830

No. .....

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1988

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DONALD CRAIG MITCHELL,

*Petitioner,*

v.

THE STATE OF ALASKA,

*Respondent.*

———o———

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

———o———

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## QUESTIONS PRESENTED

1. Whether petitioner's claim for relief that alleges that the State of Alaska's establishment and administration of a campaign finance system that allows individuals and groups to make campaign contributions to candidates seeking election to the Alaska Legislature in election districts in which neither the contributor nor, in the case of groups, their members resides violates U.S. CONST. art. IV, sec. 4 (Guaranty Clause) is justiciable?

2. Whether, for the purpose of invoking U.S. CONST. amend. XIV, sec. 1 (Equal Protection Clause), the State of Alaska's establishment and administration of a campaign finance system that allows individuals and groups to make campaign contributions to candidates seeking election to the Alaska Legislature in election districts in which neither the contributor nor, in the case of groups, their members resides is "state action"?

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

—o—

Petitioner Donald Craig Mitchell, a member of the Bar of this Court, respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of the State of Alaska entered in the above-captioned proceeding on February 8, 1989.

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Alaska is not reported. The opinion, two opinions of the Alaska Superior Court that also are not reported and petitioner's first amended complaint are reprinted in the Appendix 1-28 (App.).

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## JURISDICTION

On July 17, 1985, petitioner filed an action in the Alaska Superior Court against respondent State of Alaska. On October 6, 1987, the Superior Court entered a final judgment dismissing petitioner's complaint. On February 8, 1989, the Alaska Supreme Court issued an opinion that affirmed the dismissal. No petition for rehearing was sought.

The jurisdiction of this Court to review the opinion of the Alaska Supreme Court is invoked under 28 U.S.C. § 1257(3).

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## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. art. IV, § 4 (Guaranty Clause).

U.S. CONST. amend. XIV, § 1 (Equal Protection Clause).

Alaska Statute (A.S.) 15.13.070 (Contributions and expenditures; amount and form of payment).

A.S. 15.13.120(a) (Penalty; limitations on actions).

The pertinent text of each provision and statute is reprinted at App. 48-51.

## STATEMENT

Petitioner's complaint *inter alia* seeks a declaratory judgment that the State of Alaska's establishment and administration of a campaign finance system that allows individuals and groups to make campaign contributions to candidates seeking election to the Alaska Legislature in election districts in which neither the contributor nor, in the case of groups, their members resides violates U.S. CONST. art. IV, § 4 (Guaranty Clause) and U.S. CONST., amend. XIV, § 1 (Equal Protection Clause). App. 46-47. This petition requests the Court to review a decision of the Alaska Supreme Court regarding two jurisdictional questions, one of which (the justiciability of Guaranty Clause claims) is an important question of first impression.

Prior to Alaska statehood in 1959 money was not a significant factor in determining the outcome of Alaska elections. In 1955, for example, Vistor Fischer, a member of the Democratic Party, was elected to the Alaska Constitutional Convention. In 1956 Mr. Fischer was elected to the Territorial House of Representatives. Mr. Fischer spent less than $300 to win the delegate election and approximately $450 to win the House election. Record on Appeal 273-74 [hereinafter "ROA"].[1]

The first decade after statehood, was no different. Jay Hammond, a member of the Republican Party, was elected to the Alaska House of Representatives in 1958 and to the Alaska Senate in 1966. In 1974 he was elected to the first of two terms as Governor of Alaska. According

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[1]ROA citations are to the Alaska Supreme Court record.

to the brief Governor Hammond filed in the Alaska Supreme Court:

> In 1958, 1960 and 1962 amicus curiae ran successful campaigns for a seat in the Alaska House of Representatives. In order to avoid the appearance of prejudice in favor of any individual or special interest group, amicus curiae refused to accept *any* campaign contributions. Of course, as the Fischer affidavit describes, in those days little money was needed. Television had not permeated amicus curiae's election district, candidates were not expected to give away potholders, packs of needles, matchbooks and other trinkets, and, because there were few automobiles, in amicus curiae's district even bumper stickers were a rarity. As a result, in three House campaigns amicus curiae spent a total of less than $1,000. (emphasis in original).

Brief of Amicus Curiae the Honorable Jay S. Hammond at 4 [hereinafter "Hammond Brief"].

But by 1974 the situation had changed radically; the average cost of a House seat Victor Fischer spent $450 to win in 1956 had risen to $10,000, and the average cost of a Senate seat had ballooned to almost $22,000. ROA 171(h). Independent of a candidate's qualifications for public service, the ability to raise large amounts of money had become a nonnegotiable element of a successful candidacy.

Equally important, the amounts of money involved could not be raised from constituents. Consequently, of necessity, candidates began soliciting campaign contributions from oil and timber companies, unions, professional lobbyists and other special interests. A University of Alaska study entitled *Alaska's Elections, 1958-1984* de-

scribes the shift in the source of campaign contributions as follows:

> As the costs of campaigns soared, the funding sources on which candidates for state office depended changed radically. Organized contributors and special interests began to displace individual contributors as significant sources of campaign funds. In 1978, contributions of unions, initiative committees, lobbyists, corporations, and other groups accounted for about one-third of all campaign expenditures for state offices. By 1980, they accounted for over half; in 1982, a big year for statewide initiative campaigns, these special interest contributors covered over 90 percent of all reported campaign costs. Thus, candidates are increasingly ignoring their fading party organizations; turning to more expensive communications technology; and depending on organized, special-interest sources of campaign financing. During this century, these forces have transformed relationships between candidates and voters in all states. They have now caught up with Alaska, changing the nature of this state's election campaigns in little more than a generation.

ROA 171h.

Prior to 1974 the giving and receipt of campaign contributions was unregulated private conduct. However, in that year the Alaska Legislature enacted a comprehensive campaign finance statute. Ch. 76 SLA 1974 (codified at A.S. 15.13.010 *et seq.*). The statute prohibits contributions except those of which the State of Alaska approves. In particular, the statute prohibits individual contributions in excess of $1,000, contributions of more than $100 in cash and contributions made anonymously or in a fictitious name and establishes criminal penalties for giving or receiving unlawful contributions. A.S. 15.13.070; A.S. 15.13.120. The statute also establishes the

Alaska Public Offices Commission (APOC) and requires contributions and expenditures to be reported to the commission. A.S. 15.13.020; A.S. 15.13.040.

By not prohibiting them from doing so, the statute authorizes "political committees, businesses, corporations and labor unions" to contribute up to $1,000 to any candidate, and authorizes political parties to contribute an unlimited amount of money to candidates.[2] A.S. 15.13.070.

The 1974 statute changed nothing; special interest contributors continued tightening their grip on the Alaska electoral process, the cost of financing winning campaigns continued accelerating into the ionosphere and the average voter's ability to influence the outcome of elections and the subsequent legislative actions of successful candidates by casting or withholding his or her vote continued to wane.

In 1980 Victor Fischer ran for the Alaska Senate from Senate Election District No. H. Elected, rather than the $450 he spent to win a House seat in 1956, his 1980 campaign cost more than $80,000. ROA 274. As Senator Fischer told the Superior Court in 1986:

> 8. It is effectively impossible to raise the amount of money I raised in 1980. . . . exclusively from the residents of Senate Election District No. H. The same is true for virtually every other member of the Alaska Legislature . . . Consequently, I and other members of the Legislature have accepted, and of necessity must continue to accept, campaign contributions from persons who are not residents of our elec-

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[2]The political party loophole is a particularly egregious violation of the Equal Protection Clause. In 1984, 307,929 Alaskans were registered to vote. Of that number, 163,558, i.e., 54 per cent, were not registered to any political party.

tion districts and from organizations whose memberships are not limited exclusively to residents of our election districts.

9. Every person who does not live in Senate Election District No. H who contributes money to my campaign, and every organization that does the same, obviously does so for the purpose of attempting to influence who the registered voters of Senate Election District No. H chose to elect to represent their interests in the Alaska Senate. Persons and organizations who contribute money to my opponents' campaign do so for the same reason.

10. Persons who do not live in Senate District No. H who contribute money to my campaign do so for one or more of four reasons. Some contribute because they believe that I am the best person to be a member of the Alaska Senate. Some contribute because they agree with my position on issues of interest to themselves and do not agree with the position of my opponent. Some contribute because they believe that I will win the election whether they contribute to my campaign or not, and even though they may not agree with my position on some issues, they would like me to be favorably disposed to their concerns and believe that contributing money to my campaign is a way to accomplish this goal. Lastly, some contribute in the hope of obtaining "access," so that they are assured of an opportunity to present their views to me before I vote on bills or resolutions related to issues about which they have particular concern. They hope that if all other factors are equal, my position on a particular issue may tilt toward their position rather than away from it because they have contributed money to my last political campaign and may contribute more in the future.

11. The necessity of having to raise substantial sums of money to have a realistic chance of being elected to the Alaska Legislature, combined with the subjective expectations with which political contributions are

> made that I have described in paragraph no. 10, places considerable, and not infrequently undue, pressure on the members of the Alaska Legislature and dangerously distorts the republican form of government. This is particularly true with respect to the kind of pressure persons and organizations representing significant segments of the Alaska economy, e.g., oil field drilling companies, public employees, teachers, unions, contractors, etc., can bring to bear on members of the legislature through the making and withholding of contributions. When voting on issues of concern to such groups, it is often difficult for a legislator to vote in a manner consistent with the best interests of the residents of his or her election district without at the same time being aware that voting against the interests of such groups may result in the wraithful (sic) moneybags who professionally finance election campaigns withdrawing their financial support during the next election.

ROA 275-76.

Governor Hammond substantiated Senator Fischer's statements of fact. The Governor told the Alaska Supreme Court:

> Significantly, during the proceedings below, the State made no attempt to introduce evidence to controvert any statement of fact in the Fischer affidavit. And for good reason. As every legislator knows, and as any citizen who has observed the electoral process and the performance of the Alaska Legislature in recent years can attest, Senator Fischer's description of the manner in which out-of-district contributions infringe upon, dilute and debase the average Alaskan's exercise of his or her right to vote is factually accurate. Amicus curiae's experience closely parallels the experience described in the Fischer affidavit.

Hammond Brief at 3-4.

In his first State of the State address, Steve Cowper, the present Governor of Alaska, described the same reality to the Alaska Legislature that Governor Hammond described to the Alaska Supreme Court. According to Governor Cowper:

> [V]ery little progress can be made unless and until the Alaskan people regain their faith in the political processes and in their own government . . . Public records clearly show that most of the money contributed to campaigns comes from interest groups and beneficiary classes, most of which demand and often receive special consideration. The records also show that the role of small, individual contributors has become minimal, and the figures suggest that many candidates do not seriously pursue them anymore. While these developments are occurring all over the nation, I believe they have helped to create cynicism and distrust of government at a critical time in our history, and that we should take action to reduce the special-interest money in Alaska politics.

1987 Alaska Senate-House Joint Supplement No. 1 at 1.

Petitioner, a fourteen year Alaska resident, is registered to vote in Senate Election District No. H and House Election District No. 12, both of which are located in Anchorage. Petitioner voted in the 1984 election, throughout which his right to vote and right to associate with other residents of his election districts were repeatedly infringed by out-of-district individuals and groups who and which attempted to use campaign contributions to influence the outcome of elections in petitioner's districts that, in a constitutional sense, were none of their business.

In 1984, Joe Josephson, a Democrat, and Jerry Ward, a Republican, were the two general election candi-

dates for the District No. H Senate seat. Mr. Josephson and Mr. Ward financed their campaigns with money obtained from the following sources:

| *Source* | *Josephson* | *Ward* |
|---|---|---|
| Under $100.[3] | $ 17,370 (16.6%) | $ 4,075 ( 5.6%) |
| Corporations, unions, political action committees, political parties and other organizations. | 64,975 (62.2%) | 37,296 (52 %) |
| Individuals who were not residents of Senate Election District No. H. | 18,925 (18.1%) | 25,410 (35.4%) |
| Individuals who were residents of Senate Election District No. H. | 3,054 ( 2.9%) | 4,885 ( 6.8%) |
| TOTAL | $104,324 | $71,666 |

ROA 19-20, para. 8; ROA 775, para. 3.

Donald Clocksin, a Democrat, and Rick Uehling, a Republican, were elected to the two District No. 12 House seats. Mr. Clocksin and Mr. Uehling financed their campaigns with money obtained from the following sources:

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[3]APOC does not require candidates to identify individuals who and organizations which contribute $100 or less to their campaigns. Consequently, APOC reports cannot be used to calculate the number of small contributors who are not residents of a candidate's election district.

| *Source* | *Clocksin* | *Uehling* |
|---|---|---|
| Under $100. | $ 7,583 (34.6%) | $20,043 (30.2%) |
| Corporations, unions, political action committees, political parties and other organizations. | 12,000 (54.8%) | 32,150 (48.4%) |
| Individuals who were not residents of House Election District No. 12. | 2,180 ( 9.9%) | 9,249 (13.9%) |
| Individuals who were residents of House Election District No. 12. | 130 ( .5%) | 4,900 ( 7.3%) |
| TOTAL | $21,895 | $66,342 |

*Id.*

The situation in Election District Nos. H and 12 was not atypical. The State has admitted that the percentage of out-of-district contributions Josephson, Ward, Clocksin and Uehling received during the 1984 election was "consistent with the percentage of contributions from these sources which most other candidates who were elected to the Alaska Legislature received during the 1984 election." ROA 21-22, para. 10; ROA 775, para. 3.

Equally important, most out-of-district contributions were made by a few special interest contributors. Of the more than $2.4 million candidates received during 1984, almost half came from 50 contributors, only 12 of whom were human beings. Thirty-eight were corporations, unions and political action committees. ROA 386. Of the 12 individuals, 3 were professional lobbyists, 6 were contractors or individuals otherwise involved in the construction trades and one owns the largest bank in Alaska. ROA 397. Each of the 50 had a direct pecuniary interest in the

subsequent votes and legislative actions of the candidates their money helped elect. Contributing $109,720, VECO International, Inc., an oil field service company, was the number one contributor. Contributing $52,866, Lewis Dischner, a professional lobbyist, was the number one individual contributor. *Id.* In 1985 Mr. Dischner's lobbying firm was paid $469,068 to influence the votes of legislators Mr. Dischner's money helped elect in 1984. ROA 57.

In Senate District No. H, VECO and its subsidiaries gave Jerry Ward $13,100. In House District No. 12, Mr. Dischner, who is not a resident of the district, gave Mr. Uehling $1,000. ROA 513, 516.

On July 17, 1985, petitioner[4] filed a complaint against the State of Alaska.[5] The complaint *inter alia* sought a declaratory judgment that the State of Alaska's establishment and administration of a campaign finance system that allows individuals who are not and groups whose members are not residents of Senate Election District No. H and House Election District No. 12 to make campaign contributions to candidates seeking election to the Alaska Legislature in those districts violates U.S.

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[4]A member of the Bar of this Court, petitioner has practiced before the Court on several occasions, e.g., *Verity v. Center for Environmental Education*, No. 88-428. While pro se litigation is unusual, it is not unprecedented. *See most recently Davis v. Michigan Dept. of Treasury*, 109 S.Ct. 1500 (1989).

[5]Interested, at present, in establishing a rule of law that disapproves the State of Alaska's involvement in establishing and administering a campaign finance system that condones out-of-district contributions, petitioner did not join VECO, Mr. Dischner or other out-of-district contributors as defendants. If he had, 42 U.S.C. § 1983 would have provided jurisdiction to do so.

CONST. art. IV, § 4 (Guaranty Clause) and U.S. CONST. amend. XIV, § 1 (Equal Protection Clause). ROA 1.

On June 3, 1986, petitioner filed a motion for summary judgment, four affidavits, 23 exhibits, and a stipulation in which the State, with minor exception, admitted the facts set forth in petitioner's requests for admissions. ROA 18-26, 31-258, 267-96, 377-78, 380-776. The State did not challenge any fact contained in any affidavit, exhibit or request for admission. Instead, it filed a memorandum that opposed the motion on the merits. ROA 778-804.

On December 26, 1986, the Superior Court issued a decision denying the motion. App. 2-21. In so holding, the court found that:

> Mr. Mitchell has established the following material facts: (1) substantial amounts of money are contributed to political campaigns by individuals personally, and through groups, when such individuals do not reside in the election district which the candidate seeks to represent; (2) a substantial portion of these funds is contributed to gain support from the candidate, if elected, for the contributor's viewpoint; (3) candidates do feel a necessity to be responsive to those who have contributed to their campaigns; and (4) the public believes that the receipt of substantial contributions from persons outside of a legislator's election district compromises that legislator's ability to represent the interests of those residing in his or her district. There is no dispute as to these material facts. The propriety of summary judgment in this case turns, thus, on the question of Mitchell's entitlement to judgment as a matter of law.

App. 3.

With respect to the Guaranty Clause claim, the court found the claim justiciable, but held that the Clause requires no more than that the State of Alaska be "operated by individuals elected by residents of election districts." App. 3, 10.

With respect to the Equal Protection Clause claim, the court held that, as petitioner had alleged, A.S. 15.13.070 divides Alaska residents and other persons into two classes: a class of which petitioner is a member composed of "people whose ability to influence the outcome of an election and to be represented in the legislature is limited to the ability to vote in a given election district," and a class composed of "persons who reside in a different election district but contribute money to candidates within his [i.e., petitioner's] district." The court further held that A.S. 15.13.070 affords Alaska residents who are members of class no. 2 dual representation in the Alaska Legislature by enabling them to "(1) vot[e] in their own district and (2) contribut[e] funds to candidates in his [i.e., petitioner's] district." App. 11. The court also concluded that "it must be acknowledged that the voter who does not contribute to candidates outside his or her district has a lesser voice in government than one who does make such a financial commitment." App. 17.

However, the court determined that, while petitioner's right to vote and right to associate with other residents of his election districts are fundamental, A.S. 15.13.070's division of Alaska residents and other persons into the two aforementioned classes does not impair petitioner's exercise of either right. App. 12-19.

Lastly, the court held that if the Alaska Supreme Court or this Court were to determine that out-of-dis-

trict contributions do infringe the exercise of petitioner's right to vote or right to political association "No compelling state interest justifies the application of A.S. 15.13.070 to non-district contributors." App. 20.

On January 5, 1987, petitioner filed a motion for reconsideration. ROA 859. In addition to arguing that the court misconstrued the law, petitioner filed 12 exhibits and two affidavits, one of which was from Victor Fischer who had run for re-election to the Alaska Senate the previous November and lost to Representative Rick Uehling by 17 votes after being outspent by $38,604. *See generally* ROA 825-39, 860-69, 888-1048, 1110-11, 1205-06.

On January 9, 1987, the court ordered the State to file a response. ROA 1049-50. On January 15, 1987, the State did so. ROA 1051-56. On March 12, 1987, the court issued a decision modifying its December 26, 1986 decision and granting petitioner's motion for summary judgment. App. 22-28.

In so holding, the court relied on three pieces of evidence. The first was an exhibit that demonstrated that in the 1986 election the spending gap between winners and losers for Alaska Senate seats was $60,200, and the gap between winners and losers for House seats was $12,642. App. 23-24. The second was exhibits that documented that most of the money spent by winning campaigns was obtained from out-of-district, special interest contributors. App. 24. The third was "the facts surrounding the election of Representative Rick Uehling," which the court found "highly suggestive of the impact of non-district corporate dollars on the outcome of legislative races." *Id.* The March 12, 1987 decision concluded that:

> The court's original analysis of equal protection was predicated on a record which did not show that corporate wealth had, in reality, a decisive effect on election results. The court declined to find an infringement of the right to vote on the basis of supposition, no matter how reasonable the speculated facts might appear to be. At this time, however, there is ample evidence that wealth is an important factor in determining the outcome of State House and Senate races . . . it must be acknowledged that the necessary showing has now been made. It is evident that the plaintiff's right to vote is significantly diminished by the contributions made by persons residing outside his district . . . The court finds that pursuant to both State and Federal equal protection clauses, plaintiffs right to a relatively equal voice in determining the outcome of legislative races has been violated.

App. 24-25.

On March 23, 1987, the State filed a motion for reconsideration and four affidavits, including an affidavit from now Senator Uehling that did not deny that he had defeated Victor Fischer by 17 votes or that he had outspent Mr. Fischer by $38,904. But rather than out-of-district contributions, Senator Uehling attributed the spending gap, and by implication his victory, to $57,098 he purportedly contributed to his own campaign. ROA 1067-68.

Without providing petitioner an opportunity to respond to the State's motion, on April 15, 1987, the court vacated its March 12, 1987 decision. The court subsequently held a status conference at which it cited the State's attorney for contempt for not filing the Uehling affidavit at the time the court ordered the State to respond to petitioner's motion for reconsideration, instructed petitioner to amend his complaint to clarify

that, in addition to a declaratory judgment, the prayer requested an injunction covering all election districts and, over petitioner's objection, set the case for trial.[6] ROA 1114-19.

On May 9, 1987, petitioner filed an amended complaint. App. 29-47. On July 7, 1987, the State filed a motion to dismiss on the ground *inter alia* that A.S. 15.13.070 is not "state action" that sufficiently involves the State of Alaska in the giving and receipt of out-of-district campaign contributions to give the court jurisdiction to adjudicate the merits of petitioner's equal protection claim. ROA 1169-81. Without explanation, on October 6, 1987, the court[7] granted the motion, and entered a final judgment dismissing the complaint. ROA 1197.

On February 8, 1989, the Alaska Supreme Court affirmed. In so holding, the court announced: "we find that Mitchell's guaranty clause claims are nonjusticiable. As to his claims of equal protection violations, we conclude that there has been no state action against which these claims can be asserted." App. 1.

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[6]Throughout the confusion caused by the State's misconduct petitioner argued that the Fischer and Uehling affidavits did not give rise to disputed issues of material fact. When petitioner's appeal finally reached the Alaska Supreme Court, the State begrudgingly conceded that "the plain facts in the record are generally not in dispute." Appellee's Brief at 1.

[7]On July 20, 1987, the case was transferred from Judge Joan Katz to Judge Brian Shortell. ROA 1190.

## REASONS THE PETITION SHOULD BE GRANTED

### 1. The Justiciability of Guaranty Clause Claims Is An Important Question of Federal Law That Has Not Been, but Should Be, Settled by This Court.

Petitioner's prayer for relief requests the court to enter a declaratory judgment that:

> insofar as A.S. 15.13.070 authorizes a person who is not a resident of an election district to contribute, loan or expend (either individually or through a group, including, but not limited to, a political party, political action committee, corporation or labor union) money, goods and services for the purpose of influencing the nomination or election of a candidate seeking election to the Alaska Legislature from the district, A.S. 15.13.070 violates art. IV, § 4 of the United States Constitution. . . .

App. 46.

In pertinent part, U.S. CONST. art. IV, § 4 provides: "The United States shall guarantee to every State in this Union a Republican Form of Government."

In 1849 this Court held that a claim that challenged the validity of the government of the State of Rhode Island on the ground that the government was not republican in form, and hence violated art. IV, § 4, was not justiciable. *Luther v. Borden,* 48 U.S. 1 (1849). The Court explained its reasoning as follows:

> [I]f this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned—if it had been annulled by the adoption of the opposing government—then the laws passed by its legislature during

> that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals. When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.

*Id.* 41.

*Luther* concluded by noting the self-evident, i.e., that the validity of a state government is a question that, by its nature, does not lend itself to judicial review. According to the Court: "[I]t rests with Congress to decide what government is the established one in a state. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." *Id.* 45.

*Luther* pointedly did *not* hold that no Guaranty Clause claim can ever be justiciable. However, that is the rule of law for which it was subsequently cited.

Citing *Luther,* in *Texas v. White,* 74 U.S. 700, 730 (1868), the Court noted that "the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress." A gratuitous observation in *Taylor & Marshall v. Beckham,* 178 U.S. 548, 578 (1900), that "It was long ago settled that the enforcement of this guarantee [of a republican form of government] belonged to the political department," compounded the confusion.

In 1912 the Court revisited *Luther*. In 1902 the Oregon Constitution was amended to authorize the enactment of legislation by initiative, and in 1906 Oregon voters passed an initiative that enacted a corporate tax. A utility company challenged the tax on the ground that since the government of the State of Oregon allowed legislation to be enacted by popular vote it was no longer republican in form, hence violated the Guaranty Clause, and, consequently, both the government and the tax were invalid.

In *Pacific States Telephone & Telegraph Company v. Oregon*, 223 U.S. 118 (1912), the Court held that it had no jurisdiction to adjudicate the claim. As it had in *Luther*, the Court noted that if it found the government of the State of Oregon invalid, every statute enacted since the Oregon Constitution was amended was void and there was no lawful legislative or judicial department presently operating; a result the Court characterized as "anomalous and destructive." *Id.* 141.

To avoid this result, the Court dismissed the suit, citing *Luther* as "the leading and absolutely controlling case." *Id.* 143. However, in so holding the Court carefully distinguished between a claim that challenges the validity of a government and a claim that challenges an exercise of power by a valid government that violates the Guaranty Clause. As the Court explained the difference:

> [T]he assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its es-

> sence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form.

*Id.* 150-51.

Despite *Pacific States Telephone*'s attempt to differentiate between Guaranty Clause claims that are justiciable and those that are not, *Luther* and *Pacific States Telephone* continued to be cited for the proposition that no Guaranty Clause claim is justiciable, e.g., *Marshall v. Dye,* 231 U.S. 250, 256 (1913); *Highland Farms Dairy v. Agnew,* 300 U.S. 608, 612 (1937).

And there the matter stood until *Baker v. Carr,* 369 U.S. 186 (1962). In *Baker* the plaintiffs alleged that a Tennessee statute violated their right to equal protection because it established malapportioned election districts. A three judge court dismissed the complaint on the ground that it raised a nonjusticiable political question. This Court reversed.

In doing so, the Court first noted that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." *Id.* 209. It then announced the following test for determining when a claim for relief is justiciable:

> The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we . . . [grant the relief the ap-

> pellants request]. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking.

*Id.* 226.

Unfortunately, in passing, the Court gratuitously noted that the *Baker* plaintiffs could not have brought their claim pursuant to the Guaranty Clause. *Id.* 227. In addition to being *dictum,* the statement was inconsistent with language earlier in the opinion that characterized *Luther* as holding that the Guaranty Clause "is not a repository of judicially manageable standards which a court could utilize independently in order *to identify a State's lawful government.*" (emphasis added). *Id.* 223.

Apparently aware of the error, two years later the Court attempted to rectify it by remarking in *Reynolds v. Sims,* 377 U.S. 533 (1964), that: "As we stated in *Baker v. Carr, some* questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards." (emphasis added). *Id.* 582.

Nevertheless, as a result of *Baker's* loose language, confusion continued. *See Rutan v. Republican Party of Illinois,* 641 F. Supp. 249, 257 (D. Ill. 1986).

However, five years after *Reynolds v. Sims,* for the first time in 120 years, a federal court squarely addressed the Guaranty Clause justiciability question. In *Kohler v. Tugwell,* 292 F. Supp. 978 (D.C. La. 1969), a majority of a three judge court found that a Guaranty Clause claim was justiciable. Writing for the majority, Circuit Judge John Minor Wisdom held that the justiciability of Guar-

anty Clause claims should be decided case-by-case. According to Judge Wisdom: "The nature of the question . . . and not the mere invocation of the clause determines whether a contention is justiciable and the clause judicially enforceable." *Id.* 985. The opinion concluded as follows:

> The line of judicial development of the republican guarantee, bent and broken since *Luther v. Borden,* is not beyond repair. Some day, in certain circumstances, the judicial branch may be the most appropriate branch of government to enforce the Guaranty Clause. Federal courts should be loath to read out of the Constitution as *judicially* nonenforceable a provision that the Founding Fathers considered essential to formulation of a workable federalism. (emphasis in original).

*Id.*

In 1973 the Kansas Supreme Court became the second court to find a Guaranty Clause claim justiciable. In *Vansickle v. Shanahan,* 511 P.2d 223 (Kan. 1973), the court noted that the claims the *Luther* and *Pacific States Telephone* plaintiffs sought to advance challenged the validity of a state government, rather than the validity of an anti-republican exercise of power by an otherwise lawful government. In so holding, the court stated:

> [A]s in other cases wherein the "political" controversy bar to judicial enforcement has been raised we must look to the facts and circumstances surrounding the litigation, as well as the theory upon which the constitutional challenge is premised, to ascertain whether the issue may be resolved by the judicial process.

*Id.* 234.

The court then applied the *Baker v. Carr* justiciability test to determine that a Guaranty Clause claim challenging the validity of an amendment to the Kansas Constitution was justiciable.

Since *Kohler* and *Vansickle*, four federal courts have entertained the idea that Guaranty Clause claims are justiciable. *Byrd v. City of San Antonio*, 587 F.2d 184 (5th Cir. 1979); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated on other grounds* 431 U.S. 99 (1977); *Montgomery County, Maryland v. Califano*, 449 F. Supp. 1230 (D. Md. 1978); *Mountain States Legal Foundation v. Denver School District*, 459 F. Supp. 357 (D. Colo. 1978).

In the instant case, petitioner's Guaranty Clause claim is analogous to the claims *Kohler* and *Vansickle* found justiciable. Unlike the *Luther* and *Pacific States Telephone* plaintiffs, petitioner does not challenge the validity of the government of the State of Alaska. Rather, petitioner has alleged that anti-republican state action by an otherwise valid government violates the United States Constitution; a dispute the judicial branch is uniquely qualified to resolve.

There is no question to be decided by a coequal branch of government. And granting relief will not embarrass the State of Alaska abroad or cause grave disturbance at home. And, most importantly, the Guaranty Clause contains identifiable enforceable standards for adjudicating petitioner's claim.

This Court has had no difficulty identifying enforceable standards embodied in such phrases of the United

States Constitution as "full faith and credit," "free exercise" of religion, "unreasonable searches and seizures," "taken for public use, without just compensation," "speedy and public trial," "excessive bail" and "cruel and unusual punishments." The phrase "republican form of government" should be treated no differently.

Where are the standards embodied in the phrase "republican form of government" to be found? The "inquiry begins with an examination of the Framer's purpose." *Tashjian v. Republican Party of Connecticut*, 107 S.Ct. 544, 555 (1986). To ascertain the Framers purpose, the Court traditionally considers the Constitutional Convention debate, the *Federalist* and the context of the times during which the Constitution was drafted, debated and ratified. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 10-14 (1964) (constitutional convention debate); *Buckley v. Valeo*, 424 U.S. 1, 120-21 (1976) (the *Federalist*); *Everson v. Bd. of Education*, 330 U.S. 1 (1947) (Madison's and Jefferson's activities in the Virginia Assembly held relevant evidence of the intent of the Framer's embodied in the First Amendment).

If the instant petition is granted, using the aforementioned sources, petitioner will demonstrate that the Constitutional Convention delegates intended the Guaranty Clause to embody judicially enforceable standards. In particular, petitioner will demonstrate that the Constitutional Convention delegates intended the Clause to guarantee that the three branches of the federal government[8] would

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[8]The fact that the Guaranty Clause opens with the phrase "The United States shall guarantee," rather than "Congress shall guarantee," is important evidence that the delegates did not intend to preclude the judiciary from enforcing the Clause.

prevent members of "factions"[9] from using anti-republican methods to gain control of state legislatures and, once they did, threaten the liberty the citizenry had recently won with its blood.

In that regard, petitioner will further demonstrate that in 1787 James Madison and the other delegates would have been as outraged if the State of Virginia allowed residents of Fairfax to try, by spending money or otherwise, to purposely unduly influence who the citizens of Richmond or Norfolk chose to represent them in the Virginia Assembly as petitioner is that the State of Alaska has allowed oil companies, unions and non-resident lobbyists to use their money to purposely unduly influence who petitioner and his neighbors chose to represent them in the Alaska Legislature, and that either state doing so violates republican principles embodied in the Guaranty Clause.

In the 197 years it has been enforcing the Framer's intent, this petition is the first time the Court has been presented an opportunity to squarely decide whether a Guaranty Clause claim that challenges an alleged anti-republican act of an otherwise lawful state government is justiciable. Granting the petition will provide an opportunity to decide this important question of federal law.

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[9]James Madison defined a "faction" as a "number of citizens whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." Hamilton, Madison and Jay, *The Federalist Papers*, No. 10 at 57 (Wesleyan Univ. Press 1961). The Alaska Superior Court held that "Factions are defined [by Madison] as special interest groups are understood today." App. 5.

**2. The Alaska Supreme Court Holding That the State of Alaska's Establishment and Administration of a Campaign Finance System That Allows Out-of-District Contributions Is Not "State Action" So Far Departs From the Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of this Court's Power of Supervision.**

Prior to 1974 the giving and receipt of campaign contributions in Alaska was private conduct beyond the reach of the Fourteenth Amendment, no matter how discriminatory the conduct might have been. However, in 1974 the Alaska Legislature enacted a statute that prohibits all campaign contributions except those of which, as a matter of policy, the State of Alaska approves. Ch. 76 SLA 1974 (codified at A.S. 15.13.010 *et seq.*). And it is contributions of which the State approves that are the subject of petitioner's equal protection claim.

Fairbanks, Alaska's second largest city, is 400 miles and a mountain range north of Anchorage. If petitioner, a resident of Anchorage, gives a candidate seeking election in a Fairbanks election district money for the candidate to use to influence who residents of the candidate's district vote to represent them in the Alaska Legislature, the State allows petitioner to do so, so long as he does not give the Fairbanks candidate more than $1,000, does not give more than $100 in cash and does not give money anonymously or in a fictitious name. A.S. 15.13.070. If he does, the State may imprison petitioner for up to one year and fine petitioner as much as $5,000. A.S. 15.13.120(a). If the Fairbanks candidate fails to report receipt of petitioner's money to APOC, he also may be imprisoned and fined. *Id.*; A.S. 15.13.040.

Nevertheless, the Alaska Supreme Court concluded that "there has been no state action against which these [equal protection] claims can be asserted." App. 1.

The Alaska Supreme Court holding is an astonishing misapplication of prior holdings of this Court. Although prior to 1974 the giving and receipt of campaign contributions was private conduct, once the State of Alaska, through enactment of ch. 76 SLA 1974, asserted its jurisdiction to regulate the private conduct, the Fourteenth Amendment required it to do so in a manner consistent with petitioner's right to equal protection of the laws. *Evans v. Newton*, 382 U.S. 296, 299 (1966).

Speaking for the Court, in *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), Chief Justice Rehnquist held that a state is responsible for otherwise private conduct whenever "it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." To conclude that the State of Alaska is not exercising coercive power when it threatens to jail and fine out-of-district contributors who make contributions of which it does not approve, and threatens to jail and fine candidates who do not report receipt of out-of-district contributions is nonsensical. And by any reasonable standard of measure, the State of Alaska has significantly more involvement in the giving and receipt of out-of-district campaign contributions than the Delaware parking authority had in the racial discrimination the owner of the Eagle Coffee Shoppe perpetrated on state property in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

It also should be noted that the state action about which petitioner complains is the State of Alaska's regulation of private conduct intended to influence the outcome of state elections. Because maintaining the integrity of the electoral process is an integral part of our system of government, this Court has held that purely private conduct that affects the outcome of elections (much less state involvement in the private conduct) is state action. *Terry v. Adams*, 345 U.S. 461 (1953). *Accord Georgia v. National Democratic Party*, 447 F.2d 1271 (D.C. Cir. 1971).

As Justice Stevens recently noted in *NCAA v. Tarkanian*, 109 S.Ct. 454, 462 (1988):

> In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct. (Citation)....

That is the situation here. The State of Alaska was under no obligation to enact a legal framework governing the giving and receipt of campaign contributions, but it did. Consequently, it cannot escape the obligation to maintain a framework that comports with the Fourteenth Amendment. As Justice White noted in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982): "While misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action."

In the case at bar, the Alaska Supreme Court holding to the contrary was clear error. It was such clear error

that further briefing may not be necessary. In addition to granting the instant petition, United States Supreme Court Rule 23.1 empowers the Court to summarily dispose of the merits. The Court should consider granting the petition, reversing the no state action holding and remanding petitioner's equal protection claim to the Alaska Supreme Court for a decision on the merits.

---

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Anchorage, Alaska 99501
(907) 276-1681

*Pro se*

May 1989

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**APPENDIX A**

THE SUPREME COURT OF
THE STATE OF ALASKA

| | | |
|---|---|---|
| DONALD C. MITCHELL, | ) | File No. S-2449 |
| | ) | |
| Appellant, | ) | MEMORANDUM |
| | ) | OPINION & |
| v. | ) | JUDGMENT |
| | ) | |
| STATE OF ALASKA, | ) | [No. 437— |
| | ) | February 8, 1989] |
| Appellee. | ) | |

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Brian J. Shortell, Judge.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton and Moore, Justices.

Donald Mitchell appeals the superior court's dismissal of his complaint, in which he challenged the constitutionality of AS 15.13.070, the campaign contributions limitations statute. He contends that the state has violated the guaranty clause of the United States Constitution and that his right to equal protected under both the federal and state constitutions has been violated. U.S. Const. art. IV, § 4; U.S. Const. amend. XIV; Alaska Const. art. I, § 1. This, he asserts is because the statute does not prohibit out-of-district campaign contributions.

First, we find that Mitchell's guaranty clause claims are nonjusticiable. As to his claims of equal protection violations, we conclude that there has been no state action against which these claims can be asserted. Therefore, we hold that the trial court did not err in dismissing his complaint. Accordingly, the decision below is AFFIRMED.

## APPENDIX B

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

| | | |
|---|---|---|
| DONALD C. MITCHELL, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Case No. |
| v. | ) | 3AN-85-10473 CIV |
| | ) | |
| STATE OF ALASKA, | ) | |
| | ) | |
| Defendant. | ) | |

MEMORANDUM OF DECISION AND ORDER
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

### A. BACKGROUND

AS 15.13.070 is a 1974 reform statute which places a $1,000 cap on contributions made by individuals or groups to candidates for public office. Plaintiff Donald Mitchell seeks declaratory and injunctive relief on his claim that AS 15.13.070, as applied to allow contributions to be made to candidates by persons residing outside the candidates' election districts, is unconstitutional. In his motion for summary judgment, Mitchell argues that contributions by non-residents of the election district violate the Guaranty and Equal Protection clauses of the United States Constitution (Article IV, Section 4 and 14th Amendment, respectively) and the Equal Protection clause of the Alaska Constitution (Article I, Section 1).

The state concedes that factually and politically, Mr. Mitchell's concerns may be well founded. But it is the

state's position that, at least in regard to the Guaranty Clause, plaintiff's claims are non-justiciable. Defendant further denies that any constitutional provisions relied upon by plaintiff require a ban on campaign contributions by non-election district residents.

Plaintiff's motion for summary judgment has been extensively briefed and argued. At the hearing on October 30, 1986, this court issued a tentative ruling on the threshold question of justiciability. That ruling is now confirmed. For the reasons stated on the record at Tape F-1546, Log 2681, ff., it is concluded that plaintiff's claims are subject to judicial resolution.

As also stated on the record, the state filed no affidavits or other evidentiary material in opposition to plaintiff's voluminous factual filings. The court finds that Mr. Mitchell has established the following material facts: (1) substantial amounts of money are contributed to political campaigns by individuals personally, and through groups, when such individuals do not reside in the election district which the candidate seeks to represent; (2) a substantial portion of these funds is contributed to gain support from the candidate, if elected, for the contributors' viewpoints; (3) candidates do feel a necessity to be responsive to those who have contributed to their campaigns; and (4) the public believes that the receipt of substantial contributions from persons outside of a legislator's election district compromises that legislator's ability to represent the interests of those residing in his or her district. There is no dispute as to these material facts. The propriety of summary judgment in this case turns, thus, on the question of Mitchell's entitlement to judgment as a matter of law. Civil Rule 56.

## B. THE GUARANTY CLAUSE

Article IV, Section 4 of the United States Constitution declares:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

Plaintiff contends that the "republican form of government" guaranteed by this provision is abrogated by the infusion of campaign funds from non-election district residents. The destruction, according to Mitchell, is achieved in two ways: (1) by undue influence upon the vote of those residing within the district; and (2) by rendering the candidate, once elected, responsive to his or her outside campaign contributors, as well as to the voters who elected him or her.

### 1. Plaintiff's Historical Precedents

To discern the intent of the constitutional framers in utilizing the term "republican form of government," Mitchell relies primarily on *The Federalist Papers.* Resort to this treatise is an acceptable approach to construction of the United States Constitution. *See, Buckley v. Valeo,* 424 U.S. 1, 120-121, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Powell v. McCormack,* 395 U.S. 486, 89 S.Ct. 1944 (1969); *United States v. Classic,* 313 U.S. 299, 317-18, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). Plaintiff's conclusion, premised primarily on Federalist No. 10, is that the republican form of government was established to achieve control over "fac-

tions" which were perceived as a threat to the very stability and existence of government.

In this vein, Federalist No. 10 begins:

> Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.

Factions are defined essentially as special interest groups are understood today. Madison concludes that "A republic, by which I mean a government in which the scheme of representation takes place . . . promises the cure for which we are seeking."

Mr. Mitchell quotes extensively from the affidavit of Dr. Daniel Sisson, an expert on American colonial political history. According to Dr. Sisson, the founding fathers considered "the guarantee of a republican form of government as a check against the possibility of future revolutions." Dr. Sisson attributes to the constitutional convention delegates the view that

> If the institutions of state government could continue to be controlled by authentic republican representatives of the people selected pursuant to republican principles, it would be impossible for the monarchists, aristocrats and oligarchs to mount their own revolution to take control of the government for their own ends. And if monarchists, aristocrats and obligarchs were prevented from gaining control of government, there would be no need for the people themselves to again rise up in revolt.

Sisson affidavit, quoted at pp. 31-32 of plaintiff's opening brief. Madison's perspective is gleaned not only from his writings in *The Federalist Papers,* but also from the de-

bates surrounding adoption of the constitution. There Madison is reported to have said:

> In all cases where the representatives of the people will have a personal interest distinct from that of their constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence when they had a common interest. Debates 374.

*Id.* at p. 37 of plaintiff's brief.

Based on his reading of history, Sisson states that:

> James Madison, George Mason and Edmond Randolph, each of whom had served in the Virginia Assembly prior to the Constitutional Convention of 1787, would have been shocked if a resident of Fairfax in northern Virginia attempted to influence the residents of Richmond or Norfolk in Southern Virginia as to who they should elect to represent their interests in the Assembly. They would have viewed such intervention in the electoral process as a direct violation of elemental principles of the republican form of government. James Madison was particularly adament about the subject. He believed that even though it was a common occurrance [sic] at the time he served in the Assembly, the exertion of undue influence on voters by candidates resident within the district was a violation of republican principles. At the time he served in the Assembly it was local custom for the candidates to treat their neighbors to free alcohol and food as an inducement for their votes. When Madison stood for re-election in Orange County, Virginia, in 1777 he refused to continue the practice on the ground that it was 'inconsistent with the purity of moral and of republican principles'. His neighbors, long accustomed the exchange of liquor and food for votes, did not hold the principles of the republican form of government in the same high stead. Consequently, Madison was defeated in the election by a local tavernkeeper.

2. Defendant's Interpretation of History

The state takes a broader view of the framers' intent in including Art. IV, Section 4 in the Constitution. At oral argument, reference was made to Federalist No. 43, also authored by Madison. That paper is one of several comprising, in Madison's words, a "survey" of the plan of government set forth in the new Constitution. In No. 43, Madison addresses, among other provisions of the Constitution, the rationale underlying the Guaranty Clause. He states initially:

> In a confederacy founded on republic principles, and composed of republican members, the superintending government ought clearly to possess authority or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained.

(Emph. in original.) Virtually all of the discussion that follows in Federalist No. 43 relates to the likelihood and appropriateness of intervention by the United States in case of insurrection in one or more of the states. Madison's last paragraph, before moving on to analysis of another part of the Constitution, reads as follows:

> Among the advantages of a confederate republic enumerated by Montesquieu, an important one is 'that should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound.'

The only reference in the entire dissertation on the Guarantee Clause in Federalist No. 43 to the states' obligations (rather than that of the United States to suppress an insurrection) is presented as follows:

> As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered a grievance.

Federalist No. 43 does not specifically define the nature of a republican form of government. In Federalist No. 39, however, Madison describes a republic as

> a government which derives all of its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior.

Federalist No. 43 suggests that the primary purpose of the Guaranty Clause is to prevent destruction of the very existence of state government as a representative democracy. According to the State, the Constitution seeks only to guard against the supplanting of the representative system by a monarchy or oligarchy, and the rebellions that such a shift in power might occasion.

3. The Judiciary's Perspective on History

The Guaranty Clause has been applied in only two cases brought to this court's attention. One of these, *Kohler v. Tugwell*, 292 F.S. 978 (E.D. La. 1969), does not

appear relevant to this phase of the dispute. The other is *Vansickle v. Shanahan,* 511 P.2d 223 (Kan. 1973). *Vansickle v. Shanahan* involved review of a state constitutional amendment which authorized executive initiation of reorganization orders. The Supreme Court of Kansas found that the amendment was contrary to the separation of powers doctrine, in vesting legislative power in the executive branch of government. The court also found that separation of powers "is an inherent and integral element of the republican form of government" and is, therefore, "expressly guaranteed to the states by Article IV, Section 4 of the Constitution of the United States." *Id.* at 241.

Nonetheless, the court held that the amendment to the Kansas constitution did not abolish or destroy the republican form of government. Such would have been accomplished only if "the whole power of one department [had been] exercised by the same hands which [possess] the whole power of another department. . . ." *Id.* at 243, quoting Madison, Federalist Nos. 43 and 47. Absent such total destruction of, or material incursions upon, the distinct branches of government, Chief Justice Fatzer declined to find a violation of the Guaranty Clause.

This view is consonant with the previously referenced authorities relied upon by plaintiff. For awhile Madison expressed great concern for the undue influence of factions, he nowhere indicated that the Guarantee Clause was intended to dispense altogether with their influence. To the contrary, as quoted above, in Federalist 10, Madison acknowledges that particular special interests may control governmental functions in individual counties or states.

His view is that the republican form of government will insure that the country as a whole will not be so dominated.

Madison recognized that "undue influence" could affect the outcome of elections even under the republican form of government. As noted by Dr. Sisson, Madison purportedly lost a seat in the Virginia Legislature, because he failed to woo the voters with food and libations. Madison did not, however, declare the state of Virginia to be non-republican in form, because it countenanced such impure methods of campaigning. Yet such practices could be said to have favored the wealthier, propertied classes whose candidates could afford the more lavish culinary offerings.

Similarly, it cannot be said that the Guaranty Clause—intended to authorize the United States to dispatch the troops in the event of revolution—was expected to eradicate the impurities which admittedly pervade our electoral process. The very belief of Madison and his co-founders in the Hobbesian nature of man negates an interpretation of this provision as purporting to preclude all avenues of "undue influence." The Constitution was intended, rather, to impose upon the states a requirement that government be operated by individuals elected by residents of election districts. This system, while imperfect, remains in place in Alaska.

## C. THE EQUAL PROTECTION CLAUSE

### 1. Allegations and Framework for Analysis

Plaintiff contends that he is a member of a class of people whose ability to influence the outcome of an election and to be represented in the Legislature is limited to

the ability to vote in a given election district. He contrasts this class with that comprised of persons who reside in a different election district but contribute money to candidates within his district. These people, he argues, influence the outcome of the election in his district and obtain "dual" representation by (1) voting in their own district and (2) contributing funds to candidates in his district.

AS 15.13.070 allows for the creation of these classes. Mr. Mitchell insists that the result of the disparity between them is to dilute the effectiveness of his vote and to infringe upon his right to political association with members of his district. Because the rights of voting and political association are fundamental rights, plaintiff claims they cannot be restricted without a compelling state purpose. Since, in Mr. Mitchell's view, no such purpose exists here, he argues that the application of AS 15.13.070 violates his right to equal protection.

The framework proposed by plaintiff to analyze his equal protection claims is correct. The rights to vote and to associate with others are fundamental rights. *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and *Jordan v. Reed,* 544 P.2d 75, 81 (Alaska 1975); and *Roberts v. United States Jaycees,* 468 U.S. 609, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462 (1984); and *Alaska Gay Coalition v. Sullivan,* 578 P.2d 951 (Alaska 1978), respectively. Any infringement of such rights must be supported by a compelling state interest. *Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *State v. Ostrosky,* 667 P.2d 1184 (Alaska 1984). The two pertinent questions, then, are whether plaintiff's rights to vote and to

associate practically have, in reality, been adversely affected and, if so, whether there is a compelling state interest justifying the violations.

### 2. Have Plaintiff's Rights to Vote and Associate Politically Been Constitutionally Infringed?

In analyzing the issues posed by the first question, it must be recognized that plaintiff actually alleges the violation of three distinct rights: (1) the right to vote and thereby influence the outcome of the election; (2) the right to be represented by his elected officials; and (3) the right to associate politically with members of his House and Senate districts.

#### a. The right of political association.

Mr. Mitchell's assertion of infringement upon his right to associate politically requires little attention. No evidence has been advanced that indicates that Mr. Mitchell is not free to act in concert with members of his district. The fact that others outside his district may exercise the same political freedoms and influence activities within the district does not constitute a curtailment of plaintiff's right to associate.

#### b. The right to vote.

The question of Mr. Mitchell's right to affect the outcome of the electoral process is more complex. It is evident, however, that plaintiff's vote is worth as much as that of any other Alaskan. Mr. Mitchell, moreover, has the same opportunity as all other individuals to contribute to campaigns outside of his district.

This case is distinguishable from the reapportionment cases relied upon by plaintiff. In *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and *Reynolds v. Sims, supra,* the issue was malapportionment. The vote of an individual in one part of the state was not worth as much as the vote of another person in a different location. Here, plaintiff's vote has not been diluted.

Also distinguishable are cases such as *Shakman v. Democratic Organization of Cook County,* 415 F.2d 267 (7th Cir. 1971), *cert. denied,* 402 U.S. 909 (1971), and *Abortion Rights Mobilization, Inc. v. Regan,* 544 F. Supp. 471 (D.N.Y. 1982), relied upon by plaintiff. In these cases, governmental authorities had adopted measures explicitly favoring one side of an issue or one set of candidates over another. By injecting themselves into the political process, these governments denied competing candidates, and voters who opposed the favored candidates and positions, equal protection of the law. In contrast, under AS 15.13.070, the state's intervention is evenhanded.

The most troubling authorities advanced by plaintiff in this regard are cases which reflect judicial concern with the influence of wealth on election results. In *Tax Analysts and Advocates v. Shultz,* 476 F. Supp. 880 (D.C. 1974), a non-profit tax reform group filed suit challenging an Internal Revenue Service ruling which provided that gifts of up to $3,000 to multiple finance committees for the same candidate were to be treated as gifts to the committee and not to the candidate. Each gift a contributor might make to a different finance committee for the same candidate thus qualified for the $3,000 gift tax exclusion. Defendants there argued, *inter alia,* that the tax reform group lacked standing.

The court held that standing was dependent on the infliction of actual injury upon members of the group. One such member, a voter and small contributor to election campaigns, alleged that the revenue ruling "substantially [diminished] his ability to affect the electoral process and to persuade elected officials to adopt policies and programs he favors." He contended further that the "influence of the large contributor [was] increased while that of the small contributor [was] correspondingly reduced." 476 F. Supp. at 898. Judge Green held:

> Plaintiff Field's alleged diminution of his vote and the dilution of his ability to affect the electoral process are judicially recognized wrongs and are thus sufficient allegations of actual injury.

*Id.* at 899. Having granted standing, the court proceeded to award plaintiff summary judgment based on the decision in *Helvering v. Hutchings*, 312 U.S. 393, 61 S.Ct. 653, 85 L.Ed. 909 (1941). *Helvering* did not turn on equal protection arguments.

In the other relevant decision, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), appellant banking associations challenged a Massachusetts statute that prohibited them from contributing to referendum campaigns except where the issue involved materially affected their own property, business, or assets. The Supreme Court observed that

> Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance.

435 U.S. at 789 (citations omitted). In responding to the state's position that "corporations are wealthy and powerful and their views may drown out other points of view," the Court noted:

> If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. *Cf. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government. *Wood v. Georgia*, 370 U.S. 375, 388 (1962).

*Id.* at 789-90.

Both these cases, thus, set forth *dicta* that measures which have the effect of diminishing the ability of the individual voter and small contributor to influence the outcome of the electoral process (as contrasted to the power wielded by corporate interests and large contributors) may violate equal protection. In the *Tax Analysts and Advocates* suit, however, the ultimate ruling in the case was not predicated upon the application of equal protection principles. While the non-profit corporation alleged injury *sufficient* for *standing*, there was no ruling that this injury contravened equal protection requirements. The court's decision provides no guidance for the situation presented in this case.

*First National Bank of Boston v. Bellotti, supra,* is similarly unavailing. The court in *Bellotti* recognized that there must be a substantial showing of incursion upon the

right to vote before First Amendment rights to contribute may be curtailed. The voter survey commissioned by Mr. Mitchell in this case reveals healthy skepticism on the part of the electorate regarding the effect of "outside" contributions. But there is no more concrete evidence here than there was in *Bellotti* that substantial monetary infusions by the "favored" class results in victories for candidates which would not have occurred otherwise.

The Supreme Court expounded on the theoretical underpinnings for the First Amendment as applied in the context of corporate political activity as follows:

> [T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . . We noted only recently 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .' *Buckley*, 424 U.S., at 480-49. Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.

435 U.S. at 790-92. *See also, Common Cause v. Democratic National Committee*, 333 F. Supp. 803 (1971).

Plaintiff points, finally, to a line of Supreme Court decisions prohibiting deprivation of constitutional rights based on disparities in economic status. *See, Westberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) (voting rights); *Harper v. Virginia Board of Elections*,

383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (poll tax); *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (appeal rights contingent on payment for trial transcript); *Williams v. Illinois,* 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) (opportunity to pay fine versus working it off in jail).

In each of these cases, however, the moving party was suffering an absolute loss of a fundamental right due to total lack of resources. This court is unaware of any state or federal opinion holding that merely because wealthier citizens can afford to avail themselves to a greater extent of opportunities for political involvement, equal protection is denied. *See, Personnel Administration of Massachusetts v. Feeney,* 442 U.S. 259, 99 S.Ct. 2282, 2286, 2292-93 (1979). The economic status cases are not controlling here.

c. The right to equal representation.

The third issue, that of dual representation once successful candidates take office, is less easily dismissed. For the record is clear that elected officials do feel beholden to those who have supported them financially. Under the reasoning of the courts in *Tax Analysts and Advocates, supra; Common Cause v. Democratic National Committee, supra;* and *Shakman v. Democratic Organization of Cook County, supra;* it must be acknowledged that the voter who does not contribute to candidates outside of his or her district has a lesser voice in government than one who does make such a financial commitment.

The analysis does not end here, however. For it could certainly be argued that the voter who contributes financially to a candidate in his or her district has a

greater chance to influence the actions of that candidate once elected to public office than the voter's non-contributing neighbor. It is also clear that many voters can not afford to give $1000 to their own aspiring representatives. Yet Mr. Mitchell does not challenge this disparity under the equal protection clauses of the state and federal constitutions.

The reality is that unless virtually all means of influencing state officials are to be withdrawn, there will be differences in the amount of power brokerage attainable by different groups and individuals. Mr. Mitchell would distinguish between the expenditure of funds for lobbying *per se,* and the financing of political campaigns. But it appears that they are but different means on a temporal continuum of achieving the same ends: before the individual is elected, he or she is wooed with campaign contributions; once in office, the legislator is treated to expense account lunches or free plane rides. The $1,000 contribution cap at least places some limit on the pre-election influence peddling.

Wealth is the only non-voluntary basis for distinguishing between plaintiff's two "classes." Individuals either choose not to contribute to campaigns outside of their own districts, or they cannot afford to do so. Yet as noted above, this court does not find that in the context of election contributions, wealth amounts to a constitutional infringement of any aspect of the plaintiff's right to vote. In fact, plaintiff denied, at oral argument, that his equal protection claim is actually premised on wealth.

When subjected to closer analysis, it appears that the essence of Mr. Mitchell's claim, under the aegis of equal protection, as well as pursuant to the Guaranty Clause,

is the alleged abrogation of the republican form of government. Mr. Mitchell is aggrieved because he and his neighbors in District 12 do not have a lock on the allegiance of their elected representatives. As previously discussed, however, it is this court's conclusion that Mr. Mitchell's interpretation of "republicanism" is more restrictive than that intended by the framers of the United States Constitution. Allegations of denial of equal protection cannot alter this reality.

3. Is There a Compelling State Interest?

Having determined that fundamental rights are at stake, but that they have not been infringed, the last question—whether there is a compelling state interest to justify the violation—is obviously irrelevant. Mindful, however, that this court's ruling on the issue of constitutional violation could be overturned, it seems appropriate to consider whether a compelling state interest exists to support the allowance of contributions by non-district residents.

Defendant appears to have posited two such interests. First, the state claims that the importance of this reform legislation outweighs the more narrow interest of members of plaintiff's class in restricting campaign contributions to district residents. Defendant's argument, however, overlooks the obvious fact that as written, AS 15.13.070 need not be modified if the court grants the injunctive and declaratory relief prayed for by plaintiff. That relief would not nullify the $1,000 limitation on campaign contributions set forth in the reform legislation or any other specific provision of the law. Under AS 01.10.030, any

legislation which lacks a severability clause is governed by the following language:

> If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected.

This separability provision applies to AS 15.13.070 which contains no contrary mandate. The reforms enacted by the Legislature would remain intact should plaintiff prevail.

Second, the state suggests that the first amendment rights of the members of Mr. Mitchell's second class would be violated, were they no longer to have the opportunity to contribute to campaigns in his district. While this argument has some initial appeal, the state itself has conceded that the Legislature could adopt by law the very restriction that plaintiff seeks to have the judicial system impose. In addition, the United States Supreme Court has upheld legislation severely limiting political activity by federal employees. *United Public Workers v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). And the Court of Appeals for the District of Columbia has sustained the Corrupt Practices Act which prohibits contributions by corporations in federal elections. *United States v. United States Brewers Association,* 239 F.2d 163 (D.C. Cir. 1916). No compelling state interest justifies the application of AS 15.13.070 to non-district contributors, if the statute is ultimately determined to be violative of plaintiff's constitutional rights.

## CONCLUSION

Plaintiff's factual record raises substantial concerns about the health and vitality of our system of representative democracy. Alaska's people embrace a cynicism which suggests the state has moved from the ideals which inspired the formation of the republic. The legislation at issue, however, provides a rational means for candidates to obtain funds to support their election efforts. The statute reforms some of the abuses which had previously prevailed in the campaign system. And AS 15.13.070 reflects the reality of interests which transcend lines drawn on an election district map. Under strict scrutiny, it cannot be said that, as applied, AS 15.13.070 violates the Guaranty Clause of the United States Constitution or the equal protection clauses of the state or federal constitutions.

Based on the foregoing, IT IS ORDERED that plaintiff's motion for summary judgment is DENIED.

DATED this 26th day of December, 1986.

/s/ Joan M. Katz
Joan M. Katz
SUPERIOR COURT JUDGE

**APPENDIX C**

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

| | | |
|---|---|---|
| DONALD C. MITCHELL, Plaintiff, | ) | |
| v. | ) | Case No. 3AN 85-10,473 CIV |
| STATE OF ALASKA, Defendant. | ) | |

MEMORANDUM OF DECISION AND ORDER ON RECONSIDERATION

Plaintiff filed suit seeking injunctive and declaratory relief against the application of AS 15.13.070 to the extent it allows natural or legal persons to contribute money to political candidates seeking election in districts in which the contributors do not reside. By Memorandum and Order of December 26, 1986, this court denied plaintiff's motion for summary judgment.

Plaintiff has filed a motion for reconsideration, re-arguing most of the positions previously taken and supplementing the record with new evidence pertaining to the 1986 election. In response to the motion for reconsideration, the court issued a January 9, 1987 order authorizing responsive briefing by the State. This order noted that the issues in the case are "of considerable importance." The fact that Mr. Mitchell had greatly exceeded the page limitation set forth in Rule 77(m) was observed. Of most significance, however, the court indicated serious concern with the facts revealed in the new evidence submitted by plaintiff. The State was specifically advised of which

facts the court found relevant and given an opportunity to respond to those facts and other matters, as deemed appropriate by counsel.

The State filed its responsive briefing on January 15, 1987. Rather than address either the legal or factual questions on the merits, the State focused almost exclusively on the procedural shortcomings of the motion for reconsideration. As should have been evident from the January 9 order, the court had already recognized the procedural infirmities of Mr. Mitchell's submission. Much of his brief was surplusage and not particularly appropriate. But it was and is apparent that all that would be gained by requiring Mr. Mitchell to refile a shorter brief or one phrased in the precise terminology of the rule would be further paperwork and expenditure of time by the parties and the court. Under the particular circumstances of this case, and in light of the opportunity afforded the State to cure any prejudice it might otherwise have suffered, the court deems it more appropriate to address the merits of the case, rather than to dwell on the procedural shortcomings. The Rule 77(m)(4) deadline for the court's decision has been extended until now, pursuant to Rule 94, to accommodate the court's calendar.

## The Facts

The single most significant aspect of Mr. Mitchell's motion for reconsideration is the factual showing he has made based on the 1986 election results. Ex. EE, not challenged on any evidentiary grounds by the State, consists of newspaper articles extrapolated from Alaska Public Office Commission financial disclosure records. Those articles indicate that "On the average, the spending gap

between winners and losers in Senate races was $60,200, while in House contests, it was $12,642." ARCO was the single largest contributor, distributing $89,458 to 43 candidates. Out of the top 20 contributors, who all gave in excess of $27,000, only two were individuals; the rest were corporate entities or associations of various sorts.

Earlier evidence amply demonstrated that the vast majority of contributions to State legislative candidates come from non-district residents. Thus, it is fair to conclude that the money that is making the difference is money from "persons," mostly of the corporate variety, who are located outside the candidates' election districts, and who can afford to spend more than $1,000 in any one election year.

While not conclusive, on an individual case basis, the facts surrounding the election of Representative Rick Uehling are highly suggestive of the impact of non-district corporate dollars on the outcome of legislative races. Mr. Uehling defeated opponent Victor Fischer by (as of the time of plaintiff's briefing) 17 votes. The contributions gap was (as of the time of briefing) $55,781, in Uehling's favor. Affidavit of Jack Heesch. Mr. Mitchell's $1,000 contribution to Victor Fischer was outweighed by the non-district corporate dollars contributed to Mr. Fischer's opponent.

Equal Protection

The court's original analysis of equal protection was predicated on a record which did not show that corporate wealth had, in reality, a decisive effect on election results. The court declined to find an infringement of the right to

vote on the basis of supposition, no matter how reasonable the speculated facts might appear to be.

At this time, however, there is ample evidence that wealth is an important factor in determining the outcome of State House and Senate races. In *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 789-90, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), the Court said:

> According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. . . . *But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts.* . . .

When the like arguments in this case are considered, it must be acknowledged that the necessary showing has now been made. It is evident that the plaintiff's right to vote is significantly diminished by the contributions made by persons residing outside his district. The State may not be motivated to achieve specific, one-sided results, as was the case in *Shakman v. Democratic Organization of Cook County,* 435 F.2d 267 (7th Cir. 1970). But the impact is to discriminate on the basis of wealth, and effectively to disenfranchise the less wealthy voter. The court finds that pursuant to both State and Federal equal protection clauses, plaintiff's right to a relatively equal voice in determining the outcome of legislative races has been violated. *See, Tax Analysts and Advocates v. Shultz,* 476 F. Supp. 88 (D.C. 1984).

In analyzing plaintiff's motion for reconsideration, the court became aware for the first time that plaintiff seeks to include political parties in his proscription against contributions from persons residing outside his election district. Unfortunately, the State has never addressed the unique character and role of political parties. One indicia of their distinctive status is their treatment under AS 15.13.070(a): only political parties are exempt from the $1000 contribution limitation.

The court is concerned that application of the equal protection analysis to political parties may involve considerations distinct from those relevant to other contributors. For this reason, the court is excepting political parties from its summary judgment ruling at this time. Defendant shall have fifteen days from the date of this order in which to submit additional briefing indicating any issues of fact or law which it believes should serve to distinguish political parties from the other individuals and entities which the court has determined should be subject to the relief prayed for by the plaintiff. Plaintiff may respond to any such filing by the defendant within 10 days of service of such pleading.

As indicated in the original decision, the questions of equal representation and violation of the Guaranty Clause are closely related. In light of the reversal of the earlier ruling on the right to vote/equal protection issue, it does not appear necessary to re-enter the remaining constitutional thickets. Under the new facts adduced in the motion for reconsideration, these issues now appear to require exceedingly close judgment calls. In light of the virtual lack of precedent in these areas, it appears the

better part of judicial restraint to refrain from entering such unploughed territory absent a clear need to do so. Should the Supreme Court reverse the present holding that plaintiff's right to vote has been infringed and equal protection thereby denied, it can review the December 26, 1986 opinion and issue its own decision on the Guaranty Clause and related issues. *See, e.g., Hale v. Fireman's Fund Insurance Company,* — P.2d — (Op. No. 3152, January 30, 1987). In the alternative, the Supreme Court could remand to this court for further analysis on an expedited basis. In either event, it should be possible to obtain a final decision in time for the 1988 election.

The court has one additional concern which can be addressed at the same time the political parties issue is briefed. That concern relates to the limitation on the declaratory and injunctive relief prayed for by plaintiff. Plaintiff seeks such relief only in regard to his Senate and House election districts. The court is concerned that if such a judgment ultimately issues, it is arguable that different contribution rules would apply in different districts in the State. Yet the court's ruling is based on principles and facts that are not limited to plaintiff's districts. The court asks, thus, that the parties state their respective positions, and authority therefor, regarding amendment of the plaintiff's complaint to encompass all election districts in the State. The court's concern should be specifically addressed.

For the foregoing reasons, IT IS ORDERED that:

1. The decision of December 26, 1986 is MODIFIED to the extent it is inconsistent with this Decision and Order;

2. Plaintiff's Motion for Summary Judgment is GRANTED, except that application of this decision to political parties is reserved for future ruling; and

3. Within the time frame set forth in the above decision, the parties shall file additional briefing, no more than three pages in length, regarding the inclusion of political parties and expansion of the scope of relief in the final summary judgment order.

DATED this 12th day of March, 1987.

/s/ Joan M. Katz
JOAN M. KATZ
SUPERIOR COURT JUDGE

## APPENDIX D

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

| | | |
|---|---|---|
| DONALD C. MITCHELL, on behalf of himself and all other persons similarly situated, | ) | |
| Plaintiff, | ) | No. 3AN-85-10473 Civil |
| v. | ) | |
| STATE OF ALASKA, | ) | |
| Defendant. | ) | |

FIRST AMENDED COMPLAINT

COMES NOW the plaintiff and alleges:

I.

INTRODUCTION

1. This is a civil action which seeks a declaratory judgment that insofar as A.S. 15.13.070 authorizes a person who is not a resident of an election district to contribute, loan or expend (either individually or through a group, including but not limited to a political party, political action committee, corporation or labor union) money, goods and services for the purpose of influencing the nomination or election of a candidate seeking election to the Alaska Legislature from the district, A.S. 15.13.070 violates Art. IV, Sec. 4, of the United States Constitution (guarantee of a republican form of government), Sec. 3 of the Alaska State-

hood Act (guarantee of a republican form of government and guarantee that Alaska Constitution will not be repugnant to the Constitution of the United States), Amendment XIV, Sec. 1, of the United States Constitution (equal protection) and Art. I, Sec. 1 of the Alaska Constitution (equal protection). The plaintiff also seeks a permanent injunction prohibiting the defendant from authorizing any person who is not a resident of an election district from contributing, loaning or expending (either individually or through a group, including but not limited to a political party, political action committee, corporation or labor union) money, goods and services for the purpose of influencing the nomination or election of a candidate seeking election to the Alaska Legislature from the district.

II.

PLAINTIFF

2. Plaintiff DONALD C. MITCHELL has been a resident of the State of Alaska since 1974. The plaintiff has resided and has been registered to vote in what is now House Election District No. 12 and Senate Election District No. H since 1977, has voted in all state elections held since that time and intends to vote in the 1988 primary and general election. Plaintiff has been directly, immediately and adversely affected by the unlawful acts of the defendant described herein.

III.

CLASS ACTION

3. The plaintiff brings this action on his own behalf and on behalf of a class of persons composed of the resi-

dents of election districts whose interests are represented in the Alaska Legislature exclusively by members of the Alaska House of Representatives and Alaska Senate from their respective districts, and whose ability to ensure that such members adequately represent their interests is limited to their ability to vote for or against candidates seeking election to the legislature from their districts.

4. The members of the class are so numerous that joinder of all members is impracticable.

5. There are questions of law and fact common to the members of the class.

6. The plaintiff's claims are typical of the claims or defenses of the members of the class.

7. The plaintiff will fairly and adequately protect the interests of the members of the class.

8. The defendant has acted on grounds generally applicable to the members of the class, thereby making appropriate a declaratory judgment and a permanent injunction with respect to the class as a whole.

9. Each member of the class has been directly, immediately and adversely affected by the unlawful acts of the defendant described herein.

## IV.

## DEFENDANT

10. Defendant STATE OF ALASKA is the government of the State of Alaska, one of the fifty states of the United States of America. In 1974 the Alaska Legislature, the legislative branch of such government, enacted A.S.

15.13.070 which authorizes persons who are not residents of an election district to contribute, loan or expend money, goods and services for the purpose of influencing the nomination or election of a candidate seeking election to the Alaska Legislature from the district.

## V.

## STATEMENT OF FACTS

11. The State of Alaska is not a democracy—it is a republic. The approximately 516,000 persons resident within the state do not participate individually in decisions made by the legislative branch of government. Rather, such decisions are made by their representatives—the 40 persons elected to the Alaska House of Representatives and the 20 persons elected to the Alaska Senate who together comprise the Alaska Legislature.

12. A republican form of government requires each member of the Alaska House of Representatives to represent the interests of an equal and discrete number of Alaska residents. It requires each member of the Alaska Senate to do the same. To this end, Art. VI of the Alaska Constitution requires the Governor of Alaska to divide the state into election districts and to reapportion such districts following the official reporting of each decennial census of the United States. Most recently, on February 15, 1984, the Governor divided the state into 27 House Election Districts and 14 Senate Election Districts. The boundaries of each district have been drawn in a manner that attempts to ensure that each member of the Alaska House of Representatives and the Alaska Senate is elected by voters drawn from discrete groups of Alaska residents

each composed of a near equal number of persons. Based upon 1981 census data, the ideal number of persons residing within a House Election District is 9,210. The ideal number of persons residing within a Senate Election District is 18,421.

13. The precinct in which the plaintiff is registered to vote is located within House Election District No. 12 and Senate Election District No. H. House Election District No. 12 is located in downtown Anchorage. The district is bounded by Chester Creek on the south, Bragaw Road on the east, and the Elmendorf reservation boundary on the north and Cook Inlet on the west. Senate Election District No. H is composed of House Election District No. 12 plus House Election District No. 13. House Election District No. 13 is located immediately due east of House Election District No. 12. The district is bounded by a line beginning at the intersection of Bragaw Street and East Twentieth Avenue proceeding east to Baxter Road, north to DeBarr Avenue, east to Muldoon Road, north to East Fourth Avenue, west to Patterson Street, north to the Glenn Highway, east on the Glenn Highway to the common boundary between Elmendorf Air Force Base and Fort Richardson, then following the Elmendorf military reservation boundary to Commercial Drive, then east to Mountain View Drive, then southwesterly to the Glenn Highway, then east to Bragaw Road and south to the point of beginning.

14. Although the reapportionment of election districts described in paragraph No. 12 assures that every resident of an election district has the same mathematical opportunity to have his or her interests represented in the

Alaska House of Representatives and Alaska Senate as every other Alaska resident, election districts of near equal population do not in and of themselves assure that members of the Alaska Legislature will exclusively represent the interests of the residents of their respective districts, and members, including, but not limited to, members who have represented the interests of residents of House District No. 12 and Senate Election District No. H, have not at all times exclusively represented the interests of the residents of their respective districts.

15. The reason members of the Alaska Legislature have not at all times exclusively represented the interests of the residents of their respective election districts is that A.S. 15.13.070 authorizes persons who are not residents of an election district to contribute, loan and expend up to $1,000 per year in money, goods, and services to or on behalf of candidates seeking election to the Alaska Legislature from the district. As a result, members of the Alaska Legislature are as dependent for their election and re-election upon contributions, loans and expenditures made by persons who are not residents of their respective districts as they are upon the affirmative votes of persons who are.

16. Money, goods, and services contributed, loaned and expended pursuant to A.S. 15.13.070 by persons who are not residents of an election district to or on behalf of candidates seeking election to the Alaska Legislature from the district are contributed, loaned and expended for the sole express purpose of influencing the nomination or election of the candidates to whom the contributions and loans are made or upon whose behalf the money, goods, or

services are expended. Contributions, loans and expenditures are made in one of two ways: individually and through groups, including but not limited to political parties, political action committees, corporations and labor unions. Contributions, loans and expenditures are made for one of two reasons: either the person making a contribution, loan or expenditure supports the position, and the likely prospective voting record, of a particular candidate with respect to particular issues, or the person making a contribution, loan or expenditure intends the contribution, loan or expenditure to purchase the opportunity to influence the candidate after his or her election with respect to specific votes on particular issues.

17. Alaska residents who are not residents of an election district but who, unless prevented by defendant, will continue to contribute, loan or expend money, goods and services to or on behalf of candidates seeking election to the Alaska Legislature from the district are eligible to register to vote for and to be represented by persons seeking election to the Alaska Legislature in the election districts in which they reside. Nonresidents who, unless prevented by defendant, will continue to contribute, loan or expend money, goods and services for such purposes are eligible to register to vote for and to be represented by persons seeking election to the legislature of the state in which they reside.

18. The system of campaign financing authorized by A.S. 15.13.070 and described in paragraphs Nos. 15 and 16 enables candidates seeking election to the Alaska Legislature to raise substantial sums of money from persons who are not residents of their respective election districts,

a large portion of which is spent during the political campaign for polling, radio and television commercials, computer assisted direct mail advertisements and other sophisticated and expensive campaign techniques. Because A.S. 15.13.070 authorizes every candidate to raise substantial sums of money for such purposes, regardless of his or her merit or talent as a representative and spokesperson for the interests of the residents of his or her election district or his or her views on important public issues, unless a candidate can raise substantial sums of money from persons who are not residents of his or her district, the candidate has absolutely no chance of being elected to the Alaska Legislature. As a result, with the passing of every primary and general election, A.S. 15.13.070 has created an escalating spiral of campaign fundraising which has made every candidate more and more dependent for his or her election on campaign contributions from political parties, political action committees, corporations, labor unions and persons, particularly professional lobbyists, who are not residents of his or her election district and less and less dependent upon the registered voters of the district whose interests the candidate, at least in theory, is seeking public office to represent.

19. A.S. 15.13.070 affords persons who contribute, loan or expend money, goods, or services to or on behalf of candidates seeking election to the Alaska Legislature in election districts other than the districts in which they reside dual representation in the Alaska Legislature. Their interests are represented by members of the Alaska Legislature who represent the interests of the residents of the election districts in which they reside. And their interests

are represented, to varying extent, by members who, because of their campaign contributions, have been elected to the Alaska Legislature in election districts other than the districts in which they reside.

20. The system of campaign financing authorized by A.S. 15.13.070 has directly, immediately and adversely affected the plaintiff and other members of the class of persons of which he is a member in that the plaintiff and the other members of the class cannot depend that members of the Alaska Legislature elected to represent the interests of the residents of their respective election districts will consider, decide, and vote on important policy issues affecting the residents of such districts without providing special consideration or affording special deference to the interests of persons who are not residents of the districts but who have contributed, loaned or expended money, goods, or services to or on behalf of the members' election campaigns—and in fact, members of the Alaska Legislature have, to varying extent, afforded persons who are not residents of their respective election districts, but who have contributed, loaned or expended money, goods or services to or on behalf of their election campaigns, such consideration and deference.

21. For the reasons set forth in paragraph Nos. 19 and 20 the system of campaign financing authorized by A.S. 15.13.070 has substantially compromised the integrity of the electoral process, reduced the average citizen's confidence in, and damaged the average citizen's active and alert responsibility for, the wise conduct of state government, encouraged political corruption, and is an imminent

threat to fundamental democratic processes in every election district in the State of Alaska.

## VI.

## FIRST CLAIM FOR RELIEF

22. The plaintiff incorporates paragraph Nos. 1 through 21 by reference.

23. Art. IV, Sec. 4, of the United States Constitution requires the defendant to establish and administer a "republican form of government."

24. The delegates to the Constitutional Convention of 1787 who drafted, debated and approved Art. IV, Sec. 4, of the United States Constitution intended the phrase "a republican form of government" to embody a system for the election of members of a state legislature that ensures that each member is *exclusively dependent* for election and re-election on the registered voters of his or her election district. The delegates believed that the aforementioned election system would assure that members of the legislature will exercise due care to inform themselves of the interests, dispositions, and inclinations of the residents of their respective election districts (who, because the state is a republic, cannot participate individually in decisions made by the legislative branch of government), will allow the residents on an election district to exercise their proper degree of influence upon the conduct of members of the legislature elected to represent their interests, and will require members of the legislature to at all times consider, debate, and vote on important public issues in a manner consistent with the best interests of the residents of their respective districts.

25. In addition to the benefits described in paragraph No. 24, the delegates to the Constitutional Convention of 1787 intended "a republican form of government" to control the otherwise debilitating effects of "factions" which, unless restrained through a dilution of their influence throughout all the election districts of a state, will eventually destroy democracy. The delegates understood the term "faction" to mean "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens," i.e., persons who join together as a special interest group to influence the decisions of government to the advantage of their special interest. Political parties, political action committees, corporations and labor unions are "factions" as that term was understood by the delegates to the Constitutional Convention of 1787.

26. To the extent that A.S. 15.13.070 authorizes persons who are not residents of an election district to contribute, loan or expend money, goods and services, either individually or as members of a "faction," for the purpose of influencing the nomination or election of a candidate seeking election to the Alaska Legislature from the district, A.S. 15.13.070 violates Art. IV, Sec. 4, of the United States Constitution in that the election system it establishes is not "a republican form of government" in that members of the Alaska Legislature are not exclusively dependent on the residents of their respective election districts for their election and re-election.

## VII.

## SECOND CLAIM FOR RELIEF

27. The plaintiff incorporates paragraphs Nos. 1 through 26 by reference.

28. Section 3 of the Alaska Statehood Act, Pub. L. 85-508, requires the Constitution of the State of Alaska to "always be republican in form" and to "not be repugnant to the Constitution of the United States".

29. Art. II, Sec. 1, of the Alaska Constitution delegates the legislative power of the State of Alaska to the Alaska Legislature.

30. Art. V, Sec. 3, of the Alaska Constitution delegates the Alaska Legislature legislative power to prescribe methods of voting for members of the Alaska Legislature.

31. The legislative power delegated to the Alaska Legislature by Art. II, Sec. 1 and Art. V, Sec. 3, of the Alaska Constitution is limited by Sec. 3 of the Alaska Statehood Act to such legislative power as is consistent with "a republican form of government" and "the Constitution of the United States."

32. A.S. 15.13.070 was enacted by the Alaska Legislature pursuant to legislative power delegated pursuant to Art. II, Sec. 1, and Art. V, Sec. 3, of the Alaska Constitution.

33. For the reasons set forth in paragraphs Nos. 24 through 26, A.S. 15.13.070 is inconsistent with "a republican form of government" and violates Art. IV, Sec. 4, of the United States Constitution.

34. For the reasons set forth in paragraph No. 33, A.S. 15.13.070 violates Sec. 3 of the Alaska Statehood Act and, consequently, is an unlawful and ultra vires act of the Alaska Legislature.

## VIII.

## THIRD CLAIM FOR RELIEF

35. Plaintiff incorporates paragraphs Nos. 1 through 21 by reference.

36. The right of residents of an election district to vote for persons seeking election to the Alaska Legislature from their district is a fundamental right and any infringement of such right must be strictly scrutinized.

37. The "right to vote" described in paragraph No. 36 embodies more than the simple right to sufferage—such right is infringed by a debasement or dilution of the weight of a citizen's vote just as effectively as by the denial or prohibition of the free exercise of the franchise itself.

38. Amendment 14, Sec. 1, of the United States Constitution guarantees the plaintiff and the other members of the class of which he is a member the equal protection of the laws.

39. A.S. 15.13.070 divides persons whose interests are represented by members of the Alaska Legislature into two classes:

> *Class No. 1:* Persons who are residents of election districts whose interests are represented in the Alaska Legislature exclusively by members of the Alaska House of Representatives and Alaska Senate from such districts, and whose ability to ensure that such members adequately represent their interests is limited to

their ability to vote for or against candidates seeking election to the legislature from such districts; and

*Class No. 2:* Persons whose interests are represented in the Alaska Legislature by members of the Alaska House of Representatives and Alaska Senate elected from the election districts in which they reside, and whose interests are also represented, to varying extent, by members of the Alaska House of Representatives and Alaska Senate from election districts in which they do not reside but to whom they have contributed, loaned or expended money, goods, and services for the purpose of influencing the nomination or election of such members, and to whom, if such members vote correctly or take other appropriate legislative action, they will contribute money, goods and services in the future for the purpose of influencing the nomination and re-election of such members.

40. The plaintiff is a member of Class No. 1 described in paragraph No. 39.

41. A.S. 15.13.070's division of persons whose interests are represented by members of the Alaska Legislature into the two classes described in paragraph No. 39 discriminates against members of Class No. 1 to the advantage of members of Class No. 2. Such discrimination infringes upon the "right to vote" in that it debases and dilutes the weight of the votes of members of Class No. 1 as effectively as if the members of Class No. 1 were prohibited from the free exercise of the franchise or compelled to exercise the franchise as residents of a malapportioned election district.

42. The unequal protection of the laws and the infringement on the right to vote described in paragraph No. 41 are not justified by any lawful compelling interest of the defendant, and, consequently, A.S. 15.13.070 vio-

lates Amendment XIV, Sec. 1, of the United States Constitution.

VIII.

FOURTH CLAIM FOR RELIEF

43. Plaintiff incorporates paragraphs Nos. 1 through 21 and 38 through 40 by reference.

44. The right of a resident of an election district to associate politically with other residents of the district to elect one of their number to represent their interests in the Alaska Legislature is a fundamental right and any infringement of such right must be strictly scrutinized.

45. The "right to political association" described in paragraph No. 44 embodies more than the simple right to sufferage—such right is infringed by a debasement or dilution of the opportunity to associate politically just as effectively as by the denial or prohibition of the exercise of the franchise itself.

46. A.S. 15.13.070's division of persons whose interests are represented by members of the Alaska Legislature into the two classes described in paragraph No. 39 discriminates against members of Class No. 1 to the advantage of the members of Class No. 2. Such discrimination infringes upon the "right to political association" in that it debases and dilutes that right by enabling persons who are not residents of an election district to contribute money, goods and services to candidates seeking election to the Alaska Legislature from the district for the express purpose of intruding upon, disrupting and unduely influencing the decision of residents of the district as to which candidate they elect to represent their interests in

the Alaska Legislature. And in fact, members of Class No. 2 have contributed money, goods and services to candidates seeking election to the Alaska Legislature from districts other than the districts in which they reside and, by doing so, have diluted, debased, intruded upon, disrupted and unduly influenced the right of political association of members of Class No. 1 in every election district in the State of Alaska.

47. The unequal protection of the laws and the infringement on the right to political association described in paragraph No. 46 are not justified by any lawful compelling interest of the defendant, and, consequently, A.S. 15.13.070 violates Amendment XIV, Sec. 1, of the United States Constitution.

IX.

FIFTH CLAIM FOR RELIEF

48. Plaintiff incorporates paragraphs Nos. 1 through 21 and 36 through 42 by reference.

49. Art. I, Sec. 1, of the Alaska Constitution guarantees the plaintiff and other members of the class of persons of which he is a member equal protection under the law.

50. A.S. 15.13.070's division of persons whose interests are represented by members of the Alaska Legislature into the two classes described in paragraph No. 39 and the unequal protection under the law and the infringement of the right to vote described in paragraph No. 41 are not justified by any lawful compelling interest which bears a fair and substantial relationship to a legitimate governmental purpose of the defendant, and, consequent-

ly, A.S. 15.13.070 violates Art. I, Sec. 1, of the Alaska Constitution.

X.

SIXTH CLAIM FOR RELIEF

51. Plaintiff incorporates paragraphs Nos. 1 through 21 and 44 through 47 by reference.

52. Art. I, Sec. 1, of the Alaska Constitution guarantees the plaintiff and other members of the class of persons of which he is a member equal protection under the law.

53. A.S. 15.13.070's division of persons whose interests are represented by members of the Alaska Legislature into the two classes described in paragraph No. 39 and the unequal protection under the law and the infringement of the right to political association described in paragraph No. 46 are not justified by any lawful compelling interest which bears a fair and substantial relationship to a legitimate governmental purpose of the defendant, and, consequently, A.S. 15.13.070 violates Art. I, Sec. 1, of the Alaska Constitution.

XI.

IRREPARABLE INJURY

54. For the reasons set forth in paragraphs Nos. 19 through 21, the plaintiff and the members of the class of which he is a member have suffered, and unless the defendant is permanently enjoined, will continue to suffer, grievous and irreparable injury by reason of the defendant's authorization of persons who are not residents of an election district to contribute, loan or expend (either in-

dividually or through a group, including but not limited to a political party, political action committee, corporation or labor union) money, goods and services for the purpose of influencing the nomination or election of candidates seeking election to the Alaska Legislature from the district.

55. The plaintiff and the members of the class of which he is a member have no adequate remedy at law.

## XII.

## PRAYER

WHEREFORE, the plaintiff respectfully requests that this Court:

1. Enter an order certifying this action as a class action.

2. Enter a declaratory judgment that insofar as A.S. 15.13.070 authorizes a person who is not a resident of an election district to contribute, loan or expend (either individually or through a group, including but not limited to a political party, political action committee, corporation or labor union) money, goods and services for the purpose of influencing the nomination or election of a candidate seeking election to the Alaska Legislature from the district, A.S. 15.13.070 violates Art. IV, Sec. 4, of the United States Constitution, Sec. 3 of the Alaska Statehood Act, Amendment XIV, Sec. 1, of the United States Constitution and Art. I, Sec. 1, of the Alaska Constitution;

3. Enter a permanent injunction prohibiting the defendant from authorizing any person who is not a resident of an election district from contributing, loaning or expending (either individually or through a group, including

but not limited to a political party, political action committee, corporation or labor union) money, goods or services for the purpose of influencing the nomination or election of a candidate seeking election to the Alaska Legislature from the district;

4. Award plaintiff his costs and a reasonable attorney's fee; and

5. Award the plaintiff such other relief as the Court may deem just.

DATED: May 9, 1987

/s/ Donald C. Mitchell
Donald C. Mitchell
Pro se

## APPENDIX E

### GUARANTY CLAUSE

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence.

### EQUAL PROTECTION CLAUSE

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### ALASKA STATUTE 15.13.070

*Contributions and expenditures; amount and form of payment.* (a) A person or group, including but not limited to all political committees, businesses, corporations, and labor unions, may not contribute to or expend more than $1,000 a year on behalf of or in opposition to the competing candidates for each elective office. Political parties and their subdivisions are not subject to the limitation prescribed in this subsection, but they are subject to the reporting requirements prescribed by AS 15.13.040 (b) and 15.13.110. This chapter does not prohibit

(1) a candidate from contributing more than $1,000 of the candidate's own money to the candidate's own campaign; or

(2) individuals or groups, including but not limited to all political committees, businesses, corporations, and labor unions from contributing to or expending on behalf of a ballot proposition or question more than $1,000 a year; however, these contributions and expenditures shall be reported in accordance with AS 15.13.040 and 15.13.110.

(b) A contribution over $100 may not be made in cash or by cash payment and it may not be accepted by or on behalf of a candidate.

(c) An expenditure over $100 may not be made in cash or by cash payment unless a written receipt is obtained and filed with the commission.

(d) A contribution may not be made, and an expenditure may not be made or incurred, directly or indirectly, anonymously, in a fictitious name, or by one person in the group in the name of another, to influence the election of a candidate in an election. A contribution made by a person wishing to remain anonymous, and received by a candidate, campaign treasurer or deputy campaign treasurer, may not be used or expended, but shall be returned to the donor, if the donor's identity is known, and if no donor is found, the contribution escheats to the state if not donated by the candidate to the charity of the candidate's choice.

(e) Contributions to a candidate or a political committee may be received by, and expenditures of a candi-

date or political committee may be made by, only the candidate, campaign treasurer, or deputy campaign treasurer.

(f) *Repealed.*

(g) *Repealed.*

(h) No campaign expenditure of any type whatsoever shall be made by any candidate, treasurer, or group unless the source is disclosed as required by the provisions of this chapter whether or not those funds were received before May 10, 1974.

ALASKA STATUTE 15.13.120

*Penalty; limitations on actions.* (a) A person who violates a provision of this chapter is guilty of a misdemeanor and, upon conviction, is punishable by imprisonment for not more than one year or by a fine of not more than $5,000. A violation includes but is not limited to any of the following acts or omissions:

(1) failing to make a statement or report required to be made under this chapter, or failing to make a statement or report at the time the statement or report is required to be made under this chapter;

(2) making a campaign contribution that exceeds the limitations of AS 15.13.070;

(3) making a false statement or report under this chapter;

(4) giving or furnishing money to another person or group for the purpose of making a contribution or expenditure anonymously, in a fictitious name, or in the name of another, or contributing in violation of AS 15.13.090;

(5) making a communication to support or defeat a candidate without identification of sponsorship, in violation of AS 15.13.090;

(6) knowingly accepting a contribution in violation of AS 15.13.070.